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## Ohio

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*Oil and Gas, Natural Resources, and Energy Journal*

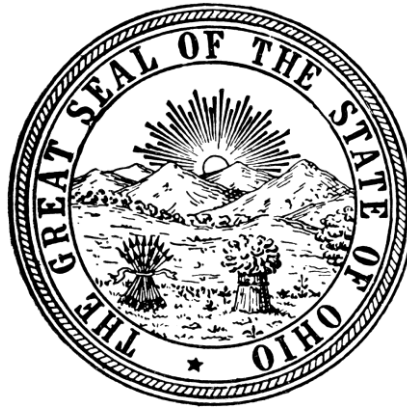
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OHIO



*Timothy M. McKeen & Melissa S. Grimes*\*

## *Table of Contents*

Toc526522119I. Introduction .....	386
II. Statutory Law .....	386
A. House Bill 430 .....	386
B. House Bill 225 .....	386
III. Common Law .....	386
A. State ex rel. Kerns v. Simmers .....	387
B. Alford v. Collins-McGregor Operating Co. ....	387
C. District Courts of Appeals .....	388

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D. Federal Court Cases .....	389
E. Pending Ohio Supreme Court Cases .....	389
IV. Conclusion .....	389

### *I. Introduction*

Since August 1, 2017, the courts and legislature of Ohio have made changes in the landscape of oil and gas law. These changes both advance the overall industry and clarify existing standards as the industry grows in the state.

### *II. Statutory Law*

Between August 1, 2017 and July 31, 2018, Ohio has enacted two important pieces of legislation relating to the oil and gas industry. In addition, there are currently three bills in committee which could be enacted in the following twelve months. In total, it is clear that the oil and gas industry is seeing increased prominence and discussion from the number of bills circulating the Ohio statehouse.

#### *A. House Bill 430*

Effective September 13, 2018, House Bill 430 expands the sales tax exemption for oil and gas production property.<sup>1</sup>

#### *B. House Bill 225*

House Bill 225 becomes effective in September of 2018.<sup>2</sup> The bill amends sections 1509.071, 1509.13, 1509.151, and 1509.34 of the Ohio Revised Code. The bill makes additional appropriations for the Idle and Orphaned Well Fund, mandating that the chief of the division of oil and gas resources management spend at least thirty percent (30%) of revenue credited to the fund plugging wells and alleviating health and safety risks.<sup>3</sup>

### *III. Common Law*

Since the development of the Utica shale, Ohio courts have witnessed a significant increase in oil and gas litigation. Over the past couple of years, the Ohio Supreme Court has had the opportunity to address various cases.

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1. See H.B. 430, 132 Gen Assemb. (Ohio 2018).

2. See H.B. 225, 132 Gen Assemb. (Ohio 2018).

3. *Id.* (amending Ohio Rev. Code § 1509.071(B)(1)).

This article analyzes the two important Ohio Supreme Court cases as well as some of the cases from the appeals level courts.

*A. State ex rel. Kerns v. Simmers*

First, the Ohio Supreme Court held in *State ex rel. Kerns v. Simmers* that a writ of mandamus is improper as relief for a potentially injurious unitization order.<sup>4</sup> In this case, the plaintiff landowners attempted to appeal a unitization order directly to the Ohio Supreme Court through a writ of mandamus.<sup>5</sup> The court reasoned that the Court of Common Pleas was a sufficient and appropriate forum for claims related to unitization order, and that the “extraordinary writ of mandamus” would not be appropriate given that other remedies were available.<sup>6</sup>

*B. Alford v. Collins-McGregor Operating Co.*

In this year’s most important ruling, the Ohio Supreme Court rejected the existence of an implied covenant to explore further in *Alford v. Collins-McGregor Operating Co.*<sup>7</sup> Following the example of the courts from other major producing states such as Oklahoma and Texas, the Ohio court found that the implied covenant of reasonable development was sufficient to protect landowner interests, and that an implied covenant to explore further is “unhelpful at best.”<sup>8</sup>

In *Alford*, a 1980 lease was held by production by a well drilled in 1981 that was producing from the Gordon Sand, a relatively shallow formation.<sup>9</sup> The plaintiff landowners argued that the lease should be forfeited as to all other formations based on an implied covenant to develop further.<sup>10</sup> The Ohio Supreme Court rejected that argument and held that Ohio’s implied covenant of reasonable development is a fact specific inquiry that was sufficient to protect the landowner without adopting a separate and distinct implied covenant to develop.<sup>11</sup> The court ruled that the lease was still valid

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4. 153 Ohio St.3d 103, 107, 2018-Ohio-256, ¶ 14, 101 N.E.3d 430, 434-35 (Ohio 2018).

5. *Id.* at ¶ 3, 153 Ohio St.3d at 104-05, 101 N.E.3d at 432.

6. *Id.* at ¶ 15 153 Ohio St.3d at 108, 101 N.E.3d at 435.

7. 152 Ohio St.3d 303, 309, 95, ¶ 27, 95 N.E.3d 382, 388 (Oh. 2018).

8. *See id.*

9. *Id.* at ¶¶ 3-5, 152 Ohio St.3d at 303-04, 95 N.E.3d at 384.

10. *Id.* at ¶ 7, 152 Ohio St.3d at 304, 95 N.E.3d at 385.

11. *See id.* at ¶ 25, 152 Ohio St.3d at 309, 95 N.E.3d at 388.

as to all formations and did not recognize an implied covenant to explore further.<sup>12</sup>

### C. District Courts of Appeals

There were numerous cases that were decided at the appellate level in Ohio this year. The following cases were significant to the oil and gas industry.

In *Shilts v. Beardmore*, the 7<sup>th</sup> District Court of Appeals held that service by publication was sufficient notice under the 2006 Dormant Mineral Act even when the surface owner did not attempt to send notice by certified mail.<sup>13</sup> In *Shilts*, the surface owner was unable to find any address for the dormant mineral owner after a detailed search.<sup>14</sup> The court held that the lack of any potential mailing address permitted the surface owner to forego attempted service by mail and use service by publication.<sup>15</sup>

In *Talbot v. Ward*, the 7<sup>th</sup> District Court of Appeals adopted the Texas based “Duhig Rule” and found it to be “persuasive.”<sup>16</sup> Although this case is very fact specific, it is important, because it is the first appellate court in Ohio to formally adopt the Duhig rule.

In *Sheba v. Kautz*, the 7<sup>th</sup> District Court of Appeals interpreted reservation language in an 1848 deed.<sup>17</sup> Specifically, the court held that a reservation of the “sole and exclusive right to all the mineral & coal lying under the tract of land above described with the right & privilege to mine the same”<sup>18</sup> was not a reservation of oil and gas.<sup>19</sup> The court noted that generally the term “minerals” does mean oil and gas, but that each reservation must be analyzed for the exact language used throughout the deed.<sup>20</sup> In this case, the court interpreted the language to mean only the non-migratory minerals such as coal based on the overall language of the deed.<sup>21</sup>

In *Browne v. Artex*, the 5<sup>th</sup> District Court of Appeals held that the statute of limitations for breach of contract applies to oil and gas leases and

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12. *See id.*

13. *Shilts v. Beardmore*, 2018-Ohio-863, ¶ 25, 2018 WL 1225745 at \*5 (Ohio Ct. App. Mar. 5, 2018).

14. *Id.* at ¶ 14, 2018 WL 1225745 at \*5.

15. *See id.* at ¶¶ 14-16, 2018 WL 1225745 at \*3-4.

16. *See* 2017-Ohio-9213, ¶ 73, 102 N.E. 544, 558 (Ohio Ct. App. Dec. 18, 2017).

17. 2017-Ohio-7699, 97 N.E.3d 893 (Ohio Ct. App. Sep. 18, 2017).

18. *Id.* at ¶ 3, 97 N.E.3d at 894.

19. *See id.* at ¶ 36, 97 N.E.3d at 902.

20. *See id.* at ¶¶ 28-29, 97 N.E.3d at 901.

21. *See id.* at ¶ 30, 97 N.E.3d at 901.

rejected the argument that the longer statute of limitations for recovery of real estate should apply to oil and gas leases.<sup>22</sup>

#### *D. Federal Court Cases*

In *Kerns v. Chesapeake Exploration, LLC*, a federal district court upheld the constitutionality of Ohio's statutory pooling scheme.<sup>23</sup>

#### *E. Pending Ohio Supreme Court Cases*

The Ohio Supreme Court is in the process of reviewing the following two cases that will have a significant impact on oil and gas development. In *Blackstone v. Moore*, the Ohio Supreme Court will address in what circumstances, if any, that Ohio's Marketable Title Act can extinguish oil and gas interests.<sup>24</sup> In *Dundics v. Eric Petroleum Corporation*, the Court will address whether oil and gas landmen need to have real estate licenses to conduct business.<sup>25</sup>

### *IV. Conclusion*

As oil and gas law continues to develop in Ohio, we will continue to see evolution and clarification, especially around the margins. Following the lead of states who have dealt with these issues over a longer period of time, Ohio will continue to expand its body of law in this industry.

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22. *Browne v. Artex Oil Company*, 2018-Ohio-3746, 2018 WL 4471737, at ¶ 25 (Ohio Ct. App. May 31, 2018).

23. *See Kerns v. Chesapeake Exploration, LLC*, No. 5:18 CV 389, 2018 WL 2952662 (N.D. Ohio, June 13, 2018).

24. 2017-Ohio-5704, 94 N.E.3d 108 (Ohio Ct. App. Jun. 29, 2017) (appeals accepted for review, *Blackstone v. Moore*, 152 Ohio St.3d 1406, 2018-Ohio-723, 92 N.E.3d 878 (Ohio 2018)).

25. 2017-Ohio-640 (appeals accepted for review, *Dundics v. Eric Petroleum Corp.* 151 Ohio St.3d 1425, 2017-Ohio-8371, 84 N.E.3d 1063 (Table) (Ohio 2018)).